

1                   IN THE UNITED STATES DISTRICT COURT  
2                   FOR THE WESTERN DISTRICT OF MICHIGAN  
3                   SOUTHERN DIVISION

4  
5 MAGNA ELECTRONICS, INC.,

6           Plaintiff,

7       v.

CASE NO: 1:12-CV-654

8 TRW AUTOMOTIVE HOLDINGS  
9 CORP., et al,

10           Defendant.

11 \_\_\_\_\_/

12                               \* \* \* \*

13                   EXCERPT OF PROCEEDINGS

14                   COURT'S RULINGS

15                               \* \* \* \*

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17       BEFORE: THE HONORABLE PAUL L. MALONEY  
18                   United States District Judge  
19                   Kalamazoo, Michigan  
20                   January 26, 2016

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1 APPEARANCES:

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KATHLEEN S. THOMAS, U.S. District Court Reporter  
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1 Kalamazoo, Michigan

2 January 26, 2016

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4 EXCERPT OF PROCEEDINGS

5 COURT'S RULINGS

6 \* \* \* \*

7 THE COURT: All right. Thank you.

8 MR. LINN: Yes.

9 THE COURT: All right. Well, here's what I'm going  
10 to do on 697 and 700. TRW has waived the advice of counsel  
11 defense and is not offering the Maharshak letter for  
12 willfulness, so those issues are off the table as it relates to  
13 this March 11, 2015, letter, and obviously off the table as it  
14 relates to any defense that TRW might wish to offer, as far as  
15 advice of counsel is concerned.

16 As far as the March 11 letter is concerned, I'm not  
17 going to rule that admissible based on what I have in front of  
18 me right now. And if TRW wants to brief this more, that's  
19 fine. But I've got a couple of concerns; number one, the  
20 letter contains a legal conclusion for which the author of the  
21 letter is not competent to give. Second, to the extent that  
22 it goes to indirect infringement, which apparently is the sole  
23 reason why it's being offered at this point, I have difficulty  
24 understanding when the operative date is for TRW's good faith.  
25 Now, it could be that the in-court testimony is going to help

1 me on this one, because I gather from Ms. Skulman's argument  
2 that there will be other witnesses to testify live about  
3 communications from Mobileye to TRW as it relates to the issue  
4 of indirect infringement. If that's the case, that buttresses  
5 the record that I don't have in front of me-- that I don't have  
6 in front of me right now, and may place in context the March  
7 11, 2015, letter. But as of now, other than the date of March  
8 11, 2015, I do not have enough confidence in when this letter--  
9 what TRW's position is as to when this letter becomes operative  
10 as to their good faith. So that's the second issue. Now, as I  
11 say, it could be that the trial testimony is going to buttress  
12 that and place the March 11 letter in context that helps me in  
13 terms of the admissability of the letter.

14 In addition to that, there is some authentication  
15 issues here, which if I understand Magna's position, they want  
16 to raise, so we've got authentication issues in terms of its  
17 admissability as well.

18 So I'm going to reserve on the March 11, 2015 letter.  
19 If TRW wants to further brief this with a response from Magna  
20 to give me a comfort level on those issues, I'll be happy to  
21 read it.

22 As far as the Stein letters are concerned, and this  
23 relates to ECF 697, I'm going to allow the Stein letters in. I  
24 think TRW's argument is well taken that to the extent that  
25 Magna's witnesses rely at least in part on the-- meaning Dr.

1 Heeger-- relies on the Stein communications, I think it's fair  
2 game to allow those letters in for purposes of the formulation  
3 of opinions by the TRW witnesses. So ECF 697, to exclude the  
4 Gideon Stein letters, is denied. For now, the motion to  
5 exclude the Mr. M (sic. Mr. Maharshak) letter is granted,  
6 subject to-- I'm not going to allow it in subject to the legal  
7 issues that I have raised, and I could change my mind if TRW  
8 wants to re-raise the issue with me.

9 I think the ECF 700 is moot because TRW has taken the  
10 reliance of advice of counsel off the table, so I don't think  
11 you need a ruling from me on that. So we are two motions  
12 closer to resolving all of the motions in limine.

13 All right. That gets us to 694.

14 MR. LINN: Thank you, your Honor. 694 is Magna's  
15 motion in limine to exclude reliance on prior art, other than  
16 the references that were designated A to U on defendants' sixth  
17 amended disclosure of prior art.

18 (Proceedings continued with oral argument - reported,  
19 not requested transcribed.)

20 MR. SENDEK: ... So there's no way that Magna can  
21 argue that we can't talk about our development that led to  
22 eventually where we stand today, but they can and try and gloss  
23 over all of the missteps and failures along the way.

24 THE COURT: All right. Thank you.

25 Well, I'm ready to rule on 694. This is Magna's

1 motion to exclude references to or reliance on prior art other  
2 than references A to U-- that's the letter U-- on Defendants'  
3 Sixth Amended Disclosure.

4 Magna expresses concerns in this motion regarding  
5 TRW's inclusion of prior references specifically barred by the  
6 Court and other attempts to circumvent prior art limitation.  
7 That's ECF 694-1 at Page ID 28731. TRW responds in part as  
8 follows:

9 TRW does not intend to rely upon any prior art  
10 references that do not appear in the Sixth Amended Disclosure  
11 of Prior Art, which is Docket 546, or that the Court has  
12 explicitly stricken. TRW inadvertently included certain  
13 already stricken references on its initial proposed exhibit  
14 list, which has not been entered in the record here. The  
15 remainder of TRW's position on this motion is at Page ID 32288,  
16 this boils down to three witnesses that are issue here; first,  
17 Dr. Jochem. In the Court's judgment, TRW has the better of the  
18 argument here. The doctor will be allowed to provide  
19 non-opinion, factual testimony about the Navlab Project. With  
20 regard to this project, Dr. Jochem is, as TRW notes, confined  
21 to be a fact witness. TRW has promised not to ask Dr. Jochem  
22 any questions going to the validity of Magna's patents or for  
23 that matter, any questions about Magna's patents at all.  
24 That's Page ID 32289.

25 The Court believes that an appropriate jury

1 instruction could satisfy the needs of both parties, one that  
2 clearly confines the jury to consider only those allowed prior  
3 art references for prior art and obviousness which go to  
4 invalidity. The Court has been cited to numerous Northern  
5 District of California cases. The Court finds that the Fuji  
6 Film Corporation case at 215-- 2015 West Law 757575 captures  
7 the best compromise, and the Court will follow that approach  
8 here, and allow TRW to rely on the additional references  
9 relating to the Navlab's project as background material, but  
10 not as anticipation or obvious references.

11 TRW tacitly admits that it seeks to rebut Magna's  
12 contentions relating to obviousness by stating: The Navlab  
13 Project is also relevant to Magna's own reliance upon certain  
14 so-called secondary considerations of non-obviousness.  
15 Specifically, Magna intends to submit evidence that secondary  
16 considerations like long felt but unresolved need, failure of  
17 others, and copying, among others, establish that its patents  
18 are non-obvious. Factual testimony concerning the Navlab  
19 Project again directly rebut these arguments. TRW seeks to  
20 excuse this by stating that "given the nature of the secondary  
21 considerations, the Navlab Project need not serve as prior art  
22 reference in order to be relevant to secondary considerations."  
23 Citing Ortho-McNeil, at 520 F.3d 1358 at 1365.

24 However, the Court finds that that citation is  
25 largely out of context. In the Court's judgment, the middle

1 ground here is to allow Dr. Jochem to testify as to his  
2 firsthand, factual, personal knowledge with respect to the  
3 Navlab Project, but to make clear to the jury that prior art  
4 references that they may consider are confined to those in  
5 Magna's sixth amendment disclosure. I would ask the parties to  
6 work on an appropriate instruction that formulates that  
7 balance.

8 As to Dr. Darrell, the Court has previously issued a  
9 ruling related to this matter. In Magna's motion to strike,  
10 the improper reliance on Navlab printed and public use prior  
11 art was raised and addressed. At that time, the Court stated  
12 it, "need not address the public use prior art dispute" because  
13 "the Navlab references were restricted to those already  
14 disclosed at an earlier date." That is ECF 529.

15 TRW now argues that Magna's public use objection  
16 before the Court at that time was TRW's disclosure of Navlab as  
17 a public use was not detailed enough, not that the disclosure  
18 of Navlab public use was untimely. TRW submits that the  
19 Court's ruling limiting TRW to two articles, a ruling based on  
20 the increased number of the  
21 articles from the Third Amended Disclosure did not resolve this  
22 issue or otherwise definitively strike TRW's disclosure of  
23 Navlab as a public use. Indeed, TRW's disclosure of the Navlab  
24 Project as a public use to not suffer from any of the defects  
25 that the Court identified in the ruling on the documents, that

1 is ECF 767, at Page ID 32292.

2 After review of the record, it's clear that the Court  
3 intended to confine Navlab references to those already  
4 disclosed at an earlier date. However, comparison of the two  
5 previous disclosures, ECF 351 and 510, reveals that TRW did  
6 include a reference to public use in the context of Carnegie  
7 Mellon Nevlab at Page 10315 of ECF 351.

8 As Mr. Sendek pointed out, Magna did not object or  
9 file a motion to strike, thus at a bare minimum, TRW's proper  
10 disclosure of the Thorpe article in conjunction with Navlab  
11 Project in its Sixth Amended Disclosure is sufficient to allow  
12 TRW to present a public use argument based upon the  
13 instrumentality identified and described therein. That timely  
14 disclosure, which the Court has referred to both-- disclosed  
15 both Thorpe and its intent to rely upon Navlab Project as a  
16 public use. So there is no surprise to Magna, in the Court's  
17 judgment. However, TRW is stuck with using only the previously  
18 disclosed particular references at the outset the Court  
19 explicitly allowed, not the Navlab Project as a whole.

20 So in sum, the Court grants in part and denies in  
21 part Magna's motion, recognizing of course, that the outset  
22 that TRW conceded much of what Magna sought, and will be held  
23 to that at trial.

24 Accordingly, the Court directs TRW to only inquire as  
25 it promises as to the witness's non-opinion, factual testimony

1 about the Navlab Project.

2 So that motion is granted in part and denied in part

3 for the reasons that I've just stated.

4 All right. Now that includes, I think--

5 MR. STERNSTEIN: Your Honor.

6 THE COURT: Go ahead.

7 MR. STERNSTEIN: We had Raglan Tribe also.

8 THE COURT: I'm going to allow Dr. Tribe to testify

9 consistent with what I've just said.

10 MR. STERNSTEIN: Okay. Thank you.

11 THE COURT: All right. Now, some rulings from the

12 bench on motions that are still outstanding, and I recognize

13 there may be still some that are outstanding that the Court's

14 going to have to deal with after this morning.

15 ECF 689. This is Magna's motion to bar defendants

16 from calling certain witnesses at trial, specifically Drs.

17 Matthew Turk and Ralph Etienne-Cummings. Magna argues that TRW

18 should not be allowed to call Turk and Etienne-Cummings at

19 trial because such testimony is undisclosed expert testimony,

20 the deposition transcripts are hearsay, and the testimony is

21 irrelevant and unduly prejudicial. That's ECF 689-1 at Page ID

22 28649. TRW counters that Magna had notice of the deposition

23 testimony, and that a deposition may be used against a party

24 under Rule 32(a), the hearsay exceptions of 804(b)(1) and 807

25 apply, and the testimony is relevant and not unfairly

1 prejudicial. That's TRW's argument at ECF 758.

2       This is really an intersection of Rule 26, Rule 32,  
3 and Rule 37. The Rule 26 contemplates witness testimony  
4 through deposition obviously. Rule 32 deals with the use of  
5 depositions in court proceedings. Rule 37(c)(1) provides that  
6 if a party fails to provide information or identify a witness  
7 as required by Rule 26(a) or (e), the party is not allowed to  
8 use that information or witness to supply evidence on a motion  
9 at a hearing or a trial, unless the failure was substantially  
10 justified or is harmless.

11       The first issue for the Court is whether TRW is  
12 required to disclose these two individuals as witnesses under  
13 26(a) or (e). On balance, the Court finds that given at least  
14 the spirit of Rule 26, TRW should have disclosed its intent to  
15 use these experts in this litigation at trial. However, the  
16 expert deposition testimony falls within the hearsay exception  
17 of Rule 32, and Rule 37 does not mandate the use of depositions  
18 of these experts be forbidden for all purposes.

19       In terms of the hearsay nature of the depositions,  
20 TRW points me to Rule 32(a), which is a freestanding exception  
21 to the hearsay rule. That's the Ueland case, U-e-l-a-n-d, vs.  
22 United States, 291 F.3d 993 at 996. That's a Seventh Circuit  
23 case. 32(a) is one of the other rules to which FRE 802 refers,  
24 evidence authorized by 32(a) cannot be excluded as hearsay  
25 unless it would be inadmissible if delivered in court.

1        32(a) provides that a deposition may be used against  
2 a party if the party was present or represented at the taking  
3 of the deposition or had reasonable notice. Second, it's used  
4 to the extent it would be admissible under FRE if the deponent  
5 were present and testifying, and the use is allowed under  
6 32(a)(2) through (8). Magna's counsel was present at both of  
7 these depositions, and indeed Turk and Etienne-Cummings were  
8 Magna witnesses. Assuming the witnesses are unavailable, the  
9 deposition testimony clearly falls within the exception. The  
10 Court finds that these witnesses are unavailable because they  
11 reside well more than 100 miles away and fall outside of the  
12 scope of the Court's subpoena power, and given the fact that  
13 these experts were Magna witnesses in prior proceedings, the  
14 Court highly doubts that the witnesses would acquiesce to  
15 testify upon the request of Magna.

16        Rule 37(c)(1) provides that if a party fails to  
17 provide information or identify witnesses required by Rule 26,  
18 the party is not allowed to use that information or witness to  
19 supply evidence at trial, unless the failure was substantially  
20 justified or is harmless. In our circuit, it's well settled  
21 that Rule 37(c)(1) does not compel the district judge to  
22 exclude testimony in its entirety. That is the Roberts ex rel.  
23 Johnson case, at 325 F.3d 776 at Page 784, a 2003, Sixth  
24 Circuit case.

25        Rather the Court in lieu of total exclusion may

1 impose other appropriate sanctions. As I've said before, I  
2 think TRW should have disclosed these witnesses. However, on  
3 balance, the Court finds that the limited use of the deposition  
4 would be harmless to the extent that the rule is concerned with  
5 notice. TRW correctly notes that Magna obviously knew about  
6 these witnesses, and the witnesses themselves were retained by  
7 Magna in advance of Magna's arguments in prior proceedings.

8 Magna argues that both Dr. Turk and Dr.  
9 Etienne-Cummings testified regarding prior art barred by this  
10 Court's prior orders. If true, the use of the testimony would  
11 obviously not be harmless and would be inconsistent with the  
12 Court's prior orders. Thus, the Court will only allow portions  
13 of the depositions to be admitted that are relevant to this  
14 case and the prior art in this case. It will be up to TRW to  
15 ensure that the use of the depositions are for those limited  
16 purposes and conform to the Court's direction. While the Court  
17 declines to exclude in its entirety the use of the depositions,  
18 the Court's order here is narrow and is not to be used as any  
19 sort of attempt to induce already barred prior art.

20 So accordingly, the motion is granted in part and  
21 denied in part. And I will allow the use of the depositions  
22 only for the very limited purposes that the Court has just laid  
23 out.

24 Magna has Motion 690, which is a motion to exclude  
25 references to defendants' other patents. Based on this record,

1 the bottom line here is the court will have to consider the  
2 objections in this regard as they arise during the trial for an  
3 individualized assessment for whether the reference is  
4 relative-- or is relevant to the case.

5 The Court advises TRW that injection of its own  
6 patents must be selective and a good faith basis for  
7 relevancy. Relevant purpose would not include in the Court's  
8 judgment references to TRW's patents for background purposes in  
9 the infringement phase. Whether TRW is an active inventor or  
10 participant in its own technology or practices its own patents  
11 is irrelevant as to whether TRW infringes with the claims at  
12 issue in this case. Even if the Court in one of the cases TRW  
13 cites to-- Even the Court in one of the cases TRW cites held  
14 that the party in the case could not present general evidence  
15 about the history of its own patents. That is the Cook case.  
16 Frankly, the last thing the jury needs in this case is a slew  
17 of other patents not directly related to this case.

18 To the extent that TRW plans to thoughtfully  
19 introduce its own patents for limited purposes, it would be  
20 better for the parties to confer, coordinate and raise any  
21 issues or objections with the Court prior to the start of the  
22 proposed testimony each day. So for now, because I can't  
23 evaluate this in its entirety, based on the record I have in  
24 front of me, the Court denies Magna's motions with the guidance  
25 that I have just given.

1       The next motion is ECF 727, which is TRW's motion to  
2       exclude the expert testimony of Michael Nranian, N-r-a-n-i-a-n,  
3       regarding secondary considerations of nonobviousness. This is  
4       ECF 727.

5       In the Court's view, Magna correctly notes that at  
6       least in part that TRW's motion boils down to the argument that  
7       Mr. Nranian's opinions do not prove secondary considerations.  
8       The Court emphasizes that the outright rejection of expert  
9       testimony is the exception rather than the rule, and the trial  
10      Court's role as a gatekeeper is not intended to serve as a  
11      replacement for the adversary system. That's *In re Northwest*  
12      *Airlines*, 197 Fed. Supp. 2d 908 at 913 and 914, an Eastern  
13      District of Michigan, 2002 opinion.

14      Vigorous cross examination, presentation of contrary  
15      evidence, and careful instructions on the burden of proof are  
16      the traditional and appropriate means of attacking shaky but  
17      admissible testimony.

18      TRW chiefly takes issue with one of the expert's  
19      reports because it allegedly, "Is not the product of reliable  
20      principles or methods, nor has the expert reliably applied the  
21      principles and methods to the facts of the case." In this  
22      regard, TRW chiefly relies on *MeadWest Vaco Corporation*, 732  
23      F.3d 1258, a federal circuit 2013 opinion.

24      Magna appropriately points out that *MeadWest Vaco* was  
25      a summary disposition case, not a *Daubert* case, and argues it

1 stands for the proposition that analysis of secondary  
2 considerations need to have a nexus to the claimed invention,  
3 citing Iron Grip Barbell, which is 392 F.3d 1317 at 1324.

4 Obviously Magna is correct in that point, and while  
5 TRW takes issue with how the witness defines the scope of the  
6 invention, that goes to the weight rather than its  
7 admissibility. Nearly all of the cases that TRW cites on this  
8 motion involve summary judgment analysis rather than  
9 admissibility at trial.

10 On balance, Magna has the better of the argument with  
11 most of the grounds that TRW seeks to challenge, "The Graham  
12 case and its progeny require the consideration of various  
13 secondary indicators of nonobviousness, including commercial  
14 success, long-felt but unsolved needs, and failure of others."  
15 That's Brown & Williamson Tobacco at 229 F.3d 1120, at 1129.

16 With respect to TRW's arguments concerning licensing,  
17 copying, and long-felt need, in the Court's judgment, all of  
18 those argument go to weight and not admissibility of the  
19 expert's testimony.

20 However, in the Court's judgment, TRW does  
21 successfully argue that the expert lacks the expertise to opine  
22 on commercial success. In terms of commercial success, the  
23 Federal Circuit has held that a nexus between commercial  
24 success and the claimed features is required.

25 In the Court's judgment, this expert is not qualified

1 to opine on commercial success in the first instance. Most  
2 notably the expert possesses an MBA, he explicitly and  
3 unequivocally states that "my opinions in this report are  
4 provided from the viewpoint of one of ordinary skill in the art  
5 at the time frame of 1995 and 1996 of the Asserted Patents."  
6 The defendant correctly notes that numerous courts have held  
7 that technical experts do not possess the necessary  
8 qualifications on commercial success issues, even when such  
9 experts have experience in areas of product design, product  
10 development, manufacturing, and sourcing. That's Wonderland,  
11 215 Westlaw 5021416, at Page 13. Commercial success requires  
12 more than a mere citation of public information which, of  
13 course, the expert relies on. For example, to establish  
14 commercial success, the patentee must provide proof that the  
15 sales were a direct result of the unique characteristics of the  
16 claimed invention as opposed to other economic and commercial  
17 factors unrelated to the quality of the patented subject  
18 matter.

19 In the Court's judgment, this expert is not qualified  
20 and does not even attempt to speak to "other economic and  
21 commercial factors unrelated to the quality of the patented  
22 subject matter." Accordingly, I'm going to allow the witness  
23 to testify on everything except commercial success. So the  
24 motion is granted in part and denied in part.

25 I've already dealt with 697, which is the Stein and

1 Mr. M (sic. Maharshak) letters, for lack of a better  
2 reference.

3 692 is Magna's motion to exclude evidence of dropped  
4 patents and claims. In this situation, Magna was forced by  
5 court order to limit the number of patents and claims  
6 asserted. So on balance, Magna's correct that the evidence of  
7 the dropped patents and claims are largely irrelevant for the  
8 first phase of the trial. And to the extent that it's  
9 minimally probative with respect to TRW's prosecution latches  
10 defense, the Court finds that the injection of the additional  
11 patents and claims will-- or the obvious-type double patenting,  
12 which is the additional issue, will unnecessarily lead to jury  
13 confusion and unfairly prejudice Magna. Accordingly, 692 is  
14 granted. However, as to the willfulness phase-- is granted as  
15 to the infringement phase of the case. However, the Court's  
16 not satisfied that it has received adequate briefing targeted  
17 specifically to the question of whether TRW's use of dropped  
18 patents and claims in the willfulness stage is appropriate.  
19 Thus, the Court orders the parties to file supplemental briefs  
20 as to only whether TRW may properly use Magna's dropped patents  
21 and claims for purposes of willfulness in the second phase of  
22 the trial. And I would ask the parties to provide those  
23 briefs, if at all possible, by Monday, February 8, 2016.

24 691 is Magna's motion to exclude pleadings and  
25 evidence of other proceedings. This is specifically trial

1 Exhibits PJ and PK, or other testimony related to other  
2 proceedings. The Court notes that this motion, while slightly  
3 different in scope, concerns the same arguments that the  
4 parties advanced in the motion previously granted on the record  
5 at the pretrial conference on January 20, 2016, that is, ECF  
6 796, and I'm not going to review what I said there, but in  
7 light of the Court's prior rulings, Magna's motion of 691 is  
8 granted.

9 All right. I think that leaves outstanding a number  
10 of motions for which I'm probably going to issue written  
11 opinions. But I also note that ECF 693, excluding references  
12 to the ICT-- I'm sorry, the ITC and IPR are outstanding, and  
13 I'm going to turn to my clerk to ask whether there is anything  
14 outstanding that I said I was going to do today.

15 LAW CLERK CLOPTON: You covered it, your Honor.

16 THE COURT: All right. Thank you, Mr. Clopton.

17 All right. That's all for today.

18 If clarifications are needed, I'll try.

19 Go ahead, Mr. Sternstein.

20 MR STERNSTEIN: Okay. Thank you, your Honor. We  
21 just want to advise you of two things that we can address  
22 whenever you want.

23 THE COURT: Okay.

24 MR STERNSTEIN: Number one, you have before you the  
25 motion for judicial notice.

1 THE COURT: Yes.

2 MR STERNSTEIN: That still is outstanding.

3 THE COURT: Thank you.

4 MR STERNSTEIN: Mr. Linn has noted one reference that  
5 he will concede to, but still I'm going to let him explain  
6 which one he wants, you know, on those. But that is still  
7 outstanding, and depending on your ruling, we will bring in the  
8 IEEE witness or not for that. So we have that issue. The  
9 other issue we had talked about this Rajeeb Nath. We are  
10 informed that Rajeeb Nath is out of the country, so he is  
11 clearly unavailable, he is overseas in India-- yes, in India,  
12 so.

13 THE COURT: Is the weather good in India now?

14 MR STERNSTEIN: I'm sure it's better than here. But  
15 that being the case, it's-- we would want to utilize his  
16 deposition transcript. And there is an objection raised on  
17 that. Those are two issues that will be, however you want to  
18 handle that.

19 THE COURT: Was there a supplemental filing on ECF  
20 723?

21 MR STERNSTEIN: With regard to either of these? Oh,  
22 yes, there was.

23 THE COURT: Did you want to say anything about that  
24 or are you just going to stand on what you filed?

25 MR STERNSTEIN: We just showed that-- We will stand

1 on what is filed. It's just providing your Honor with two  
2 exhibits, and basically showing admissions that there was no  
3 such alleged implied license agreement.

4 THE COURT: All right. For purposes of the record,  
5 this is ECF 804, which is TRW's submission, and Magna's  
6 response is ECF 808. Thank you for that.

7 Mr. Linn, I don't know if you want to say anything  
8 about your 808 or not.

9 MR. LINN: I don't want to belabor that. We put it  
10 in our short material we provided a couple counter documents to  
11 counter the information they submitted.

12 THE COURT: All right. Thank you.

13 MR. LINN: Your Honor, there was a sort of a  
14 housekeeping issue. The parties have discussed on the exhibit  
15 lists, we have previously-- there was an errata sheet submitted  
16 previously because there was a correction needed to be made,  
17 and we did it once. There is another correction that needs to  
18 be made, and we have sort of waited until now to make sure we  
19 got all of the corrections rather than do it on a daily basis.  
20 So there is an errata on Magna's exhibit list that we would ask  
21 the Court's indulgence to file. As I understand it, there is  
22 no objection, and it's just making sure they are complete as to  
23 the production numbers on a couple of the exhibits.

24 THE COURT: All right, Mr. Sternstein?

25 And you are going to do a single sheet on that you

1 are not going to re-file the whole document?

2 MR. LINN: Correct.

3 THE COURT: Like TRW did on theirs.

4 MR. LINN: Yes.

5 THE COURT: Any objection, sir?

6 MR STERNSTEIN: No, your Honor, no objection.

7 THE COURT: All right. Great.

8 MR STERNSTEIN: We will have the same thing as far as  
9 a witness list, if we have to bring the person from IEEE.

10 THE COURT: All right. Thank you.

11 Anything else for the record?

12 MR. LINN: No. If the Court wants to hear any  
13 comments about this judicial notice, I'm happy to make some  
14 comments now, we can submit a paper, how ever you want us to  
15 deal with it.

16 THE COURT: Why don't you give it to me in writing,  
17 that way I can evaluate TRW's submission and your submission,  
18 and if TRW wants to weigh in a reply, that's fine too.

19 MR. LINN: And just so the Court understands, there  
20 was a number of different references.

21 THE COURT: Right.

22 MR. LINN: We have not objected to a couple earlier  
23 on, we then did another evaluation. We said that we would not  
24 object to one of them, and now the remaining group all suffer  
25 from the same infirmity. I think there is four of them, but

1 it's the same issue as to each one of them, so it's only really  
2 one issue.

3 THE COURT: Okay. Great. Thank you.

4 Mr. Sternstein, go ahead, sir.

5 MR STERNSTEIN: Yes. I just wanted to double-check  
6 if your Honor had any instructions on the Nath issue, how you  
7 wanted to resolve that one? Judicial notice, you have all of  
8 the papers.

9 THE COURT: Right.

10 MR STERNSTEIN: There really hasn't, you know, we  
11 have submitted his deposition transcript, it's been objected  
12 to. I didn't know if you wanted to hear arguments.

13 THE COURT: You want to get some guidance on that.

14 Mr. Linn, what is your position regarding these  
15 witness? If he is in India, how long does it take to get to  
16 New Delhi, I mean I don't know.

17 MR. LINN: I would love to go try to hunt for him.

18 THE COURT: You are not suggesting it would be nicer  
19 to be in New Delhi than Kalamazoo, are you?

20 MR. LINN: Depends on the day, your Honor.

21 THE COURT: Okay.

22 MR. LINN: Mr. Nath is a third-party who used to be a  
23 Magna employee and he's since left. After the close of  
24 discovery, frankly, I think it was in November or something,  
25 they took his deposition in the Magna III case is what we call

1 it. Now they are trying to interject it in this case, and that  
2 is the basis of our objection. We don't believe that's  
3 correct.

4 THE COURT: And what is the problem?

5 MR. LINN: The problem is his testimony is in the  
6 context of the things that-- it's in the context of his  
7 activities--

8 Better collect my thoughts, your Honor.

9 THE COURT: That's all right.

10 MR. LINN: Engage brain before engaging the mouth.

11 THE COURT: We have been dealing with a lot of issues  
12 today, and I appreciate the fact you need to, okay, now I'm  
13 ready. Go ahead.

14 MR. LINN: That's right, your Honor.

15 Mr. Nath was involved with Magna's activities with  
16 various products and what have you. At the time that he was  
17 being deposed, it was in the context of Magna III. Certainly  
18 we would have been-- had a different view, if you will, in  
19 terms of interrogating Mr. Nath in cross in response if we  
20 thought that we were going to be facing his testimony here in  
21 this suit as opposed to some later trial when we may have had  
22 other opportunities to drag him in here.

23 THE COURT: Related to issues that were involved in  
24 Magna III, but not in this case?

25 MR. LINN: Well, his testimony I believe is in

1 general to his activities at Magna, and potentially they would  
2 apply to both, but he was being deposed in Magna III. He is a  
3 third party. We were-- We did ask questions at the end of  
4 cross, but at the time, we were not contemplating that his  
5 testimony was going to show up in this case, and we potentially  
6 would have asked different or more questions.

7 THE COURT: Okay. Thank you.

8 Go ahead, Mr. Sternstein or Mr. Sendek.

9 MR. SENDEK: Your Honor, Mr. Nath is a-- there is  
10 different patents in Magna III and Magna I, and that is the  
11 only thing that's different. Mr. Nath's testimony that's been  
12 designated, you know, to the question put to Mr. Linn, why  
13 don't they want-- it's really bad for Magna. He testifies  
14 about, you've heard a lot about how whether or not there was a  
15 two-supplier market. Mr. Nath says it wasn't. There was a  
16 bunch of other competitors. He says-- He talks at length  
17 about something I foreshadowed a little earlier, about how  
18 Magna's-- what Magna's homegrown solution to a lot of these,  
19 you know, technological problems, high beam control and stuff  
20 like that were failed, they were abandoned projects. He  
21 testifies about history and the competition. There are things  
22 that are common to both Magna I and Magna III. And Mr. -- We  
23 noticed his deposition when he was still a Magna employee, it  
24 just took us so long to get his deposition that in the interim  
25 he had moved on. So you know, the fact that he is a

1 third-party is something that was-- he became a third-party at  
2 a point in time beyond our control. And we have asked for--  
3 We had a number of-- Magna is bringing a number of  
4 third-parties-- I shouldn't say at least one third-party to  
5 this lawsuit, Mr. Scofield, one of the inventors is a  
6 third-party-- I think he is retired-- and Magna seems to be  
7 able to get him to come in and give testimony on their behalf.  
8 We asked them if you can bring in Mr. Nath, and they said we  
9 cannot get him to come to trial, and we are not authorized to  
10 accept a subpoena on his behalf. So I'm surprised to hear  
11 well, we can't get him in for Magna I, but we could have gotten  
12 him in for Magna III. So he is allowable-- we are allowed to  
13 use his deposition if he is unavailable under both Rules 804  
14 and 32. 804 explicitly says whether the testimony was given  
15 during the current proceeding or a different one. Doesn't even  
16 say earlier, later, same time, it just says any different  
17 proceeding. And all it has to be is offered against a party  
18 who had or predecessor in interest had an opportunity and  
19 similar motive to develop it by directing cross examination.  
20 They had the opportunity and motive. They cross examined him  
21 on the same issues that are live issues in both Magna III and  
22 Magna I, which is competition and prior efforts to develop. I  
23 guess the only thing left is maybe they would have tried a  
24 little harder, if they knew it was going to be used in Magna  
25 I. We didn't know the witness was going to be in India either,

1 maybe we would have tried a little harder with respect to what  
2 the questions we asked him, but that's not a cognizable reason  
3 to keep his deposition out under either 804 or 32.

4 THE COURT: All right. Thank you. Well, based on  
5 what I've heard this afternoon, I'm going to allow the witness  
6 to testify. I will review, however, the designations based on  
7 the representations of how the testimony is relevant, and if I  
8 have a different view or want to cut it down, I'll let you  
9 know. But for now, based on what I've heard, I'm going to  
10 allow the deposition to be read.

11 Now, of course the trial judge always inquires-- Are  
12 the principals still working?

13 MR STERNSTEIN: They are still working, your Honor.

14 Nothing has been resolved yet. Last I heard, I was  
15 trying to get-- check emails yet this morning. They were going  
16 to try and meet this afternoon, but I don't know that, in fact,  
17 that schedule has-- that they have been able to do it, but last  
18 heard-- Bottom line, there are still discussions.

19 THE COURT: Mr. Linn, your perspective?

20 MR. LINN: He has more info than I, your Honor, which  
21 is always embarrassing.

22 THE COURT: No, that's all right.

23 MR. LINN: But I do know they are talking. I knew  
24 they were going to try to get together. There is some  
25 international travel problems on both sides with the power

1 brokers that would actually close the deal, so they are trying  
2 to resolve a lot of issues at different levels.

3 THE COURT: All right. Well, thank you. Obviously I  
4 appreciate your work in trying to come to an amicable  
5 resolution of the case. I mean, in large measure, it boils  
6 down to a business decision, and if you're still working on it,  
7 that's good news for the Court, and I certainly appreciate the  
8 fact that you're still working on it. If we can get it done,  
9 fine. If not, I don't think we are going to have any more  
10 court hearings before February 1st, so I'll see you February  
11 1st at 8:45 if we are going to go to trial.

12 MR STERNSTEIN: Thank you very much, your Honor.

13 MR. LINN: Thank you, your Honor.

14 COURT CLERK: All rise, please.

15 Court is adjourned.

16 (At 12:26 p.m., proceedings were concluded.)

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REPORTER'S CERTIFICATE

I, Kathleen S. Thomas, Official Court Reporter for  
the United States District Court for the Western District  
of Michigan, appointed pursuant to the provisions of Title  
28, United States Code, Section 753, do hereby certify  
that the foregoing is a true and correct transcript of  
proceedings had in the within-entitled and numbered cause  
on the date hereinbefore set forth; and I do further  
certify that the foregoing transcript has been prepared by  
me or under my direction.

/s/

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